Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

John Carman,

Petitioner,

v.

Alicia Fuentes, Jeanne Daumien, Tom Ribsyk,Russell Hixon, Dave Wells, Rudy Camacho, David Bond, T. Burgess, B. Stoney, M. Chambers, Raymond W. Kelly, United States Treasury, Doe 1, an Unknown Police Officer of the La Mesa Police Department, and Does 2 through 50,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit decision disregarded the rule announced by this Court in Saucier v. Katz by not resolving factual issues in favor of the injured party and thus decided petitioner's case which alleges constitutional violations in a way that conflicts with relevant decisions of this Court.

PARTIES TO THE PROCEEDING

Petitioner is John Carman.

Respondents are Alicia Fuentes, Jeanne Daumien, Tom Ribysk, Russell Hixon, Dave Wells, Rudy Camacho, David Bond, T. Burgess, B. Stoney, M. Chambers, Raymond W. Kelly, United States Treasury, Doe 1, an Unknown Police Officer of the La Mesa Police Dept., and Does 2 through 50.

TABLE OF CONTENTS

Page #

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICITON.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....2

REASONS FOR ALLOWING THE WRIT 5

I. The Ninth Circuit erred because all disputed factual issues that it analyzed were viewed in a light most favorable to Respondents,the non-injured party 6

II. The Ninth Circuit ignored several important factual issues in their decision when

they should have examined these facts in a light favorable to Petitioner therefore, they incorrectly reversed the District Court's decision 10

CONCLUSION.....12

APPENDIX I

APPENDIX II

TABLE OF AUTHORITIES

Page #

Supreme Court Cases:

Anderson v. Liberty Lobby, Inc.,
447 U.S. 242, 255 (1986) . 8

Saucier v. Katz,
533 U.S. 194 (2001) 4, 5, 6, 7, 9

Federal Court of Appeals Cases:

Jeffers v. Gomez,
267 F.3d 895 (9thCir.2001) ...8, 9

U.S. v. Payne,
181 F.3d 781(6thCir. 1999) 9

Constitutional Provisions:

U.S.Const.amend. I . 3

U.S.Const.amend.IV . 1, 3

U.S.Const.amend.V .. 3

U.S.Const.amend. XIV . 3

Federal Statutes:

5 U.S.C.§ 1221 3

28 U.S.C.§ 1331 . . 4

28 U.S.C.§1254(1) . . .1

42 U.S.C.§ 1983 .. 1, 3, 4

42 U.S.C.§ 1985 . . 4, 5-

42 U.S.C.§ 2000(e). . 4

Rules of the Supreme Court of the U.S:.

Rule 10 (c) 6

State Statutes:

Cal. Penal Code§1538.5 . 4

Appendix

Court of Appeals Opinion*: John Carman v. Alicia Fuentes, Defendant And Todd Burgess; et al., Defendants-Appellants*, (9th Cir. 2004) Not Published .. App. I

United States District Court Order by Judge Jeffrey T. Miller in *John Carman v. Alicia Fuentes*, et al. Case No. 00 CV 1215 . App. II

John Carman ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished. That opinion reversed the decision of the United States District Court for the Southern District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered June 15, 2004. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STAUTORY PROVISIONS

The Fourth Amendment of the United States Constitution.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On June 16, 1999, Petitioner was driving his vehicle in La Mesa, California and proceeded to make a left turn which he had previously and appropriately signaled. App. II, p. 0198. Despite the fact that he had committed no traffic violations the La Mesa Police Officers, namely Respondent Burgess, at the request of United States Customs Agents, stopped Petitioner's vehicle. App. II, p. 0198. The stop was requested by the United States Customs Department ("Customs") because they allegedly had received false information, about seven months earlier, that Petitioner was still, after no longer working for Customs, identifying himself as a Customs Agent and carrying a concealed weapon for which he had no permit. App. II, p. 0198. Customs, apparently recognizing that there was insufficient probable cause to stop Petitioner, requested that La Mesa Police follow Carman (Petitioner), find probable cause to stop him and let his actions dictate what else might happen. App. II, p 0198. Appellant Burgess never mentioned to

Petitioner that he had stopped him for failing to signal nor did he issue a citation for that offense. App. II, p. 0198-0199.

Petitioner then filed his original complaint on June 16, 2000, suing the Department of Treasury and certain Customs employees based upon retaliatory actions taken against him for disclosing corruption and violations of the law by Customs agents while he was employed as a Customs Special Agent and subsequent to his employment. App. II, p. 0197. Some of the alleged retaliation occurred subsequent to his employment and involved Customs contacting the La Mesa Police Department and requesting that they stop Petitioner's vehicle to determine if he was identifying himself as a current Customs employee and whether or not he was carrying a concealed weapon. App. II, p. 0198. Petitioner sued the four La Mesa Police Officers, Stoney, Burgess, Bond and Chambers, who participated in the stop of his vehicle and detention under 42 U.S.C. § 1983. App. II, p. 0197. The basis for federal jurisdiction in the first instance was under 28 U.S.C. § 1331.

Petitioner filed a First Amended Complaint on November 7, 2001 which Respondents answered on November 27, 2001. The First Amended Complaint alleged violations of 42 U.S.C. §§ 1983, 1985, 2000(e), wrongful termination, violations of the First, Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution and the Whistleblower Protection Act (5 U.S.C. § 1221), violation of the covenant of good faith and fair dealing, negligence and unlawful retaliation and reprisal. App. II, p. 0197.

All federal Defendants filed motions to dismiss and/or for summary judgment mostly for failure to be properly served which were granted resulting in the last of federal Defendants being dismissed by the District Court Order filed August 1, 2002. App. II, p. 0197, n. 2.

On July 1, 2002, the four identified La Mesa Police Officers named in the complaint filed a summary judgment motion based upon qualified immunity. App. II, p. 0197. On December 5, 2002, the District Court granted in part and denied in part said motion. App. II, p. 0205. Specifically, the District Court granted the motions of Defendants Bond and Chambers on the ground that they did not participate in the traffic stop and detention of Petitioner. App. II, p. 0204-0205. The District Court granted the motions as to all police officers on the claims brought under 42 U.S.C. § 1985 and those brought directly under the Constitution but, as to Respondents Stoney and Burgess and the § 1983 claim, the motion was denied. App. II, p. 0204-0205.

The District Court ruled, as to Respondents Stoney and Burgess, that material facts existed as to whether a traffic violation occurred, whether a turn signal was given or necessary, whether Petitioner could lawfully be stopped and whether they violated 42 U.S.C. § 1983. App. II, p. 0202-0204. The District Court, applied the two prong test of Saucier v. Katz in finding that there was a violation of a constitutional right, that the right was clearly established and that Respondents' actions were not objectively reasonable. Saucier v. Katz, 533 U.S. 194 (2001). Based upon this analysis the District Court denied summary judgment based upon qualified immunity. App. II, p. 0202-0204.

Further confirmation of the unlawful stop occurred when San Diego Superior Court Judge Lantz Lewis granted Petitioner's Motion to Suppress all evidence seized during the stop pursuant to California Penal Code Section 1538.5. App. II, p. 0200. Judge Lewis specifically found that the stopping of Petitioner's vehicle was unconstitutional in violation of Petitioner's Fourth Amendment rights as the officer, Burgess, did not have probable cause to stop the vehicle because no traffic violation was committed and the

information relied on was stale. App. II, p. 0200. The stop, according to Judge Lewis, was on a "hunch."

Although the District Court in the civil case denied Petitioner's argument that Judge Lewis' ruling in the criminal case should be binding on the District Court under the collateral estoppel doctrine, the Court noted the ruling and made similar findings. App. II, p. 0200-0205. The District Court held that whether or not a traffic violation was committed and whether or not the information Customs received was stale were clear issues of material fact in dispute which would impact the validity of the stop and therefore, after applying the two prong Saucier v. Katz test, Petitioner's summary judgment motion based on qualified immunity was denied. Id. App. II, p. 0200-0205.

On January 2, 2003, Respondents Stoney and Burgess filed the Notice of Appeal to the Ninth Circuit Court of Appeals and on January 3, 2003, Petitioner filed a Motion for Reconsideration regarding the District Court having granted Defendant Bond's and Chamber's summary judgment motion. On January 16, 2003, the District Court issued an Order denying the Motion for Reconsideration. On January 17, 2003, the District Court vacated the jury trial set for January 22, 2003 due to this Appeal. The Ninth Circuit Court of Appeals filed a judgment on June 15, 2004, reversing the decision of the District Court for the Southern District of California. App. I, p. 1-3. The Ninth Circuit's decision effectively granted the Respondents summary judgment for the only remaining defendants, Stoney and Burgess. App. I, p. 1-3. From that decision Petitioner now respectfully requests review by this Court.

REASONS FOR ALLOWING THE WRIT

The Ninth Circuit's decision reversing the District Court conflicts with the decision of this Court in Saucier v.

Katz. Id. In Saucier this Court stated, "[a] court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light *most favorable to the party asserting the injury*, do the facts alleged show the officer's conduct violated a constitutional right" (emphasis added). Id. at 201. Despite the straightforward rule that requires a court to view in a favorable light the Petitioner's version of the facts, the Ninth Circuit took every opportunity to discount or ignore the critical facts that Petitioner presented. This directly conflicts with relevant decisions of this Court. Rules of the Supreme Court of the U.S., Rule 10(c).

I

THE NINTH CIRCUIT ERRED BECAUSE ALL DISPUTED FACTUAL ISSUES THAT IT ANALYZED WERE VIEWED IN A LIGHT MOST FAVORABLE TO RESPONDENTS, THE NON-INJURED PARTY.

In the three page decision by the Ninth Circuit each fact in contention by the parties was either decided in favor of the Respondents or ignored completely. App. I, p. 1-3. Although the Ninth Circuit cites the proper law in the beginning of the opinion by stating, "[w]e may exercise jurisdiction over a denial of summary judgment on qualified immunity grounds taking all facts and inferences in favor of the plaintiff...," the decision clearly does not abide by this principle. App. I, p. 2.

An important inference that the Ninth Circuit failed to take in favor of Petitioner was the origin of the tip that led to Petitioner's arrest. Respondents claimed that the Petitioner himself made the tip to Customs that he was carrying false credentials and a concealed weapon. Petitioner denies this rumor. He states that this information was false and obtained by Customs from sources other than himself. However, the Ninth Circuit accepted the version propounded by the Respondents and completely disregarded the version

Petitioner set forth. App. I, p. 3. Accepting the Respondents' version of the facts instead of Petitioner's and offering no justification for this departure from established law is grounds for granting certiorari to correct the Ninth Circuit's faulty judgment. *See* Saucier, 533 U.S. 194.

Another important fact that the Ninth Circuit construed in a way most favorable to Respondents, the moving party, is what "confidential cover" can mean when it appears after a license plate is processed on a police computer. When a license plate is run through the computers and "confidential cover" appears it could mean that the individual is a private investigator, previous victim of a crime or is a current law enforcement officer. However, the Ninth Circuit disregarded the interpretations of "confidential cover" that were favorable to Petitioner and accepted the Respondents arguments. App. I, p. 3. The Ninth Circuit's opinion reads that because Petitioner's license plate came up as a "confidential cover" it "indicated to the Officers that Carman was continuing to represent himself as a law enforcement officer." App. I, p. 3. This fact could just as easily been interpreted as meaning that Carman was a private investigator or a previous victim of a crime. Yet the Ninth Circuit used the interpretation in the light *least* favorable to the injured party and completely disregarded controlling United States Supreme Court case law. *See* Saucier, 533 U.S. 194.

Further bolstering the reality that the Ninth Circuit did not view facts in a light favorable to Petitioner is that the criminal court decision and District Court decision dealing with the identical issues found that the vehicular investigatory stop could not have been constitutionally justified. In the criminal case against Petitioner the District Court judge determined that the stop of Petitioner was made without probable cause in violation of Petitioner's Fourth Amendment rights. This was the same determination that the

United States District Court reached in the initial motion for summary judgment made by Respondents in the civil case.

Because of the finality of granting a summary judgment motion against a party, the law is clear that a court must view the evidence in the light most favorable to the nonmoving party and not make credibility determinations or weigh the evidence as the trier of fact. Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 255 (1986). The Ninth Circuit disregarded this rule and therefore, this Court should grant certiorari to safeguard the rights of Petitioner that the Ninth Circuit failed to protect.

II

THE NINTH CIRCUIT IGNORED SEVERAL IMPORTANT FACTUAL ISSUES IN THEIR DECISION WHEN THEY SHOULD HAVE EXAMINED THESE FACTS IN A LIGHT FAVORABLE TO PETITIONER; THEREFORE, THEY INCORRECTLY REVERSED THE DISTRICT COURT'S DECISION.

The Ninth Circuit was required to take "all facts and inferences in favor of the plaintiff." Jeffers v. Gomez, 267 F.3d 895, 905-06 (9th Cir. 2001). In addition to the facts that the Ninth Circuit analyzed improperly, they also ignored a number of facts that were important to the determination of qualified immunity.

First, a major point of contention in this case is whether Petitioner signaled his left turn as this was the purported reason for pulling him over. The Ninth Circuit mentions this issue in passing yet disregards the requirement that they view it in a light favorable to Petitioner. App. I, p. 2. The Ninth Circuit's entire discussion regarding this

crucial fact is as follows: 'material questions of fact exist as to whether Carman committed a traffic violation since he claims to have engaged his left turn signal." App. I, p. 2. This single sentence by the Ninth Circuit does not discharge their duty to take 'all facts and inferences in favor of the plaintiff." Id. If the Ninth Circuit had analyzed this fact and viewed it with an inference toward Petitioner, as they were supposed to, it would be evident that there was not reasonable objective suspicion to stop Petitioner and that Respondents should not be granted immunity. Petitioner claims he signaled his left turn, at this stage in the proceeding the court was required to accept that as true.

Curiously absent from the Ninth Circuit's sparse three page decision is any reference to the staleness of the tip received by the La Mesa Police Department. As noted earlier, the tip that Respondents acted on was seven months old. Petitioner repeatedly claimed that the stale tip which also contains minimal detail could not have possibly created reasonable suspicion. *See* U.S. v. Payne, 181 F.3d 781, 789 (6th Cir. 1999) ('[t]he tip in this case lacked any of the traditional indicia of reliability identified in those cases, and it was stale. It was clearly insufficient to create a reasonable suspicion'). The Ninth Circuit evaded any discussion of whether or not the tip was stale. This violated their duty to take "*all* facts and inferences in favor of plaintiff" (emphasis added). Jeffers, 267 F.3d at 905-06.

Avoiding the analysis of important factual issues that would defeat the Respondents' claim of qualified immunity directly conflicts with established case law from this Court. Saucier, 533 U.S. 194. The Ninth Circuit disregarded any analysis whatsoever of a number of important facts. After disregarding this analysis the court proceeded to reverse the decision of the District Court and order the granting of summary judgment for the Respondents. Because of the defective ruling by the Ninth Circuit Petitioner has been

denied any chance to redress the violation of his Constitutional rights.

CONCLUSION

Petitioner's case is extremely important because it originated when he exposed corruption and illegal activity occurring in the United States Customs Department. The United States District Court for the Southern District of California found that the retaliatory actions taken by Customs and La Mesa Police Officers created issues of material fact as to whether Petitioner was denied his constitutional rights. Inexplicably and contrary to the laws of the United States the Ninth Circuit reversed that decision, dismissed the case and ended Petitioner's chances of achieving redress for the violations occasioned against him.

For the foregoing reasons Petitioner respectfully requests that this Court grant his writ of certiorari.

Respectfully Submitted,

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In the
United States Court of Appeals
For the Ninth Circuit

No. 03-55070
DC No. CV-0001215-JTM

John Carman,
Plaintiff-Appellee
v.
Alicia Fuentes, and Todd Burgess, et al.,
Defendants-Appellants.

Appeal from the United States District Court
For the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted June 9, 2003
Decided June 15, 2003

Memorandum*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-4

Before: TROTT, RYMER and THOMAS, Circuit Judges.

La Mesa Police Officers Todd Burgess and Brian Stoney ("the Officers") appeal the district court's denial of summary judgment for qualified immunity in a civil action under 42 U.S.C. Section 1983. We may exercise jurisdiction over a denial of summary judgment on qualified immunity grounds "taking facts and inferences [] in favor of the plaintiff...." *Jeffers v. Gomez*, 267 F.3d 895, 905-906 (9th Cir. 2001). We review the district court's decision denying summary judgment *de novo*, *Bingham v. City of Manhattan Beach*, 341

F.3d 939, 945 (9th Cir. 2003), and we reverse. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

As concluded by the district court, and conceded for the purposes of summary judgment here, material questions of fact exist as to whether Carman committed a traffic violation since he claims to have engaged his left turn signal. Thus, the constitutionality of the stop turns on whether the Officers had reasonable suspicion Carman was carrying fraudulent credentials and a concealed weapon based on information provided by the United States Customs Department. Although Carman claims the Officers could not have believed the stop was justified on this basis, the inquiry is objective and subjective beliefs are irrelevant. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Thus, it is irrelevant whether the Officers may have believed that reasonable suspicion was not present.

At the time of the stop, the Officers had received information from a law enforcement agency that it believed Carman was carrying false credentials and a concealed weapon in violation of law. That information was based, not on an anonymous informant, but from a Customs officer who had received the information directly from Carman. Before stopping Carman, the Officers requested information about his license plate indicating it was a "confidential cover." Officer Burgess knew from his experience that "confidential cover" was used by current law enforcement officers to protect their personal information. This indicated to the Officers that Carman was continuing to represent himself as a law enforcement officer. These specific, articulable facts created reasonable suspicion that Carman was engaging in criminal conduct independent of any perceived traffic violations. Therefore, the vehicular investigatory stop was constitutionally justified. *United States v. Lopez-Soto*, 205 F.3d 1101, 1104-05 (9th Cir. 2000).

II

'If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Thus, we must reverse the judgment of the district court denying Officers qualified immunity.

REVERSED.

United States District Court
Southern District of California

JOHN CARMAN,
Plaintiff,
v.
ALICIA FUENTES, et al.,
Defendants.

Case No. 00CV 1215 JM (LSP)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff has filed an action against several La Mesa Police Department officers under 42 U.S.C. Section 1983 and section 1985, and directly under the Fourth, Fifth and Fourteenth Amendments.[1] Plaintiff also brings a Bivens action against certain United States Customs ('Customs') agents. Plaintiff alleges that his rights were violated by defendant police officers because they stopped plaintiff's vehicle and searched him and his vehicle without probable cause at the direction of the federal defendants subjecting him to harassment and arrest. In response, the defendant La Mesa Police officers have brought this motion for summary judgment based upon qualified immunity.[2]

II. BACKGROUND

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[1] Plaintiff's direct claims under the Constitution are cumulative of the constitutional wrongs asserted under the section 1983 claim against La Mesa officers.

[2] The federal defendants previously brought motions to dismiss which were granted dismissing them from the action.

Without making any final factual determinations, the current record before the court indicates the following set of events concerning a June 16, 1999 traffic stop of plaintiff.

Prior to the June 16, 1999 traffic stop, La Mesa Police Sergeant Garcia told Detective David Bonds ('Bonds') that Customs was investigating plaintiff for falsely identifying himself as a Customs Inspector.[3] In addition, Customs Agent Alicia Fuentes ('Fuentes'), one of t he named federal defendants, contacted Bonds and informed him that in November 1998 plaintiff had told a Customs employee that he always carried a gun and used copied Customs credentials to justify carrying the firearm.[4] Fuentes requested that a La Mesa Police officer perform a traffic stop of plaintiff to see if he would identify himself as a Customs agent and if he was illegally carrying a concealed weapon.[5] La Mesa Officer Stoney ('Stoney'), Officer Burgess' ('Burgess') supervising officer, was also informed of the situation and assigned Burgess to follow plaintiff the day of the traffic stop. At about 10:45 a.m., Stoney heard from the dispatcher that plaintiff had left his home and told Burgess to 'follow Carman until he had probable cause to make a traffic stop."[6]

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[3] Plaintiff states in his declaration that Customs officials falsely maintain that he continued to identify himself as a Customs agent and that he displayed a Customs badge without authority after he was terminated. Carman Declaration. ¶ 11

[4] Bonds Declaration ¶ 5.

[5] On June 15, 1999, the day prior to the traffic stop, Bonds called the San Diego Sheriff's Office Registration Unit and found out that plaintiff carrying a concealed weapon (CCW) permit was inactive and that Plaintiff was not authorized to carry a concealed weapon. Bonds Decl. ¶ 6.

[6] Stoney Declaration ¶¶ 8.

After leaving his home on June 16, 1999, plaintiff was driving eastbound on Interstate 8, eventually exited the freeway, and entered into a designated left-hand turn lane marked by a left arrow painted on the surface of the roadway. Plaintiff proceeded to turn left onto Grossmont Center Drive and was pulled over by Burgess, who had been following plaintiff while on Interstate 8, for failing to execute a left-hand turn signal.[7] Plaintiff states that he did signal his left-hand turn when he turned left on Grossmont Center Drive.[8]

During the traffic stop, plaintiff initially told Burgess that he was with Customs after Burgess asked Plaintiff why he had a confidential cover on his license plate.[9] Plaintiff stated that he was on administrative leave "with Customs" but would not give further clarifications about his employment status.[10] Burgess then radioed Stoney and told him that he clearly saw U.S. Customs credentials in plaintiff's wallet when plaintiff handed him his driver's license. Moreover, when Burgess returned to plaintiff's car and asked him if he had a gun, plaintiff answered that he had a loaded weapon under the car seat.[11] When Stoney arrived on scene and asked plaintiff what authority allowed him to carry the weapon, plaintiff responded by showing him the

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[7] Burgess Declaration ¶ 5-8.

[8] Carman Declaration ¶ 8.

[9] See Garvin Declaration, Ex. 5, pp. 1-2. License plates that have a confidential cover do not reveal the home address of the owner and are often used by law enforcement officers.

[10] Garvin Declaration, Ex. 5, p. 2

[11] Garvin Declaration. Ex. 5, pp. 4-5

U.S. Customs credentials. Agent Fuentes, who arrived after Stoney, told Stoney in plaintiff's presence that U.S. Customs had not authorized plaintiff to carry a concealed weapon to which plaintiff responded by displaying California private investigator and security guard cards to the officers as authorization for carrying the concealed firearm.[12] Additionally, plaintiff told the officers that he was waiting for a call on a private investigation case on which he was working. Stoney then contacted the Department of Consumer Affairs, which issued the investigator and guard cards, and was told that plaintiff could carry an exposed firearm when working as a uniformed security guard or as a private investigator, but that neither card allowed plaintiff to carry a concealed weapon.[13]

Bonds had heard of the stop of plaintiff over the radio at 11:20 a.m. and arrived on scene at 11:30 a.m. where he was briefed by Stoney. Bonds investigated plaintiff's claim that he was currently working on a private investigation case by calling plaintiff's alleged client who stated she had not yet hired plaintiff but was contemplating doing so. At some point after the traffic stop but before Bonds arrived, Chambers arrived in response to a dispatch request that an officer assist Burgess in a traffic stop. After the one-and-a-half hours traffic stop, plaintiff's firearm, a .45 caliber pistol, was seized along with the private investigator and security guard cards.[14]

Following the traffic stop, plaintiff was prosecuted for illegally carrying a concealed weapon under California Penal

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[12] Stoney Declaration ¶¶ 12-14

[13] Stoney Declaration, ¶ 15. Plaintiff also told the officers during the course of the stop that the CCW permit that he had was not active. Garvin Decl., Ex. 5, pp. 10-11.

[14] Garvin Decl., Ex. 6, p.6.

Code Section s 12025(a)(1) and 12031(a)(1).[15] However the state trial court suppressed the evidence finding that even if plaintiff failed to signal his turn a signal was not required under California Vehicle Code section 22107 since plaintiff was in a designated turn lane.[16] In addition, the court found that the seven month old report by the Customs employee was stale and could not supply reasonable suspicion to justify stopping plaintiff.[17]

III. DISCUSSION

A. Collateral Estoppel

Plaintiff claims that the prior state court ruling suppressing the evidence from the traffic stop due to the lack

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[15] California Penal Code § 12025(a)(1) provides: "A person is guilty of carrying a concealed firearm when he or she does any fo the following: Carries concealed within any vehicle which is under his or her control or direction any pistol revolver, or other firearm capable of being concealed upon the person."

Additionally, California Penal Code § 12031 (a)(1) states, "A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of an unincorporated territory."

[16] California Vehicle Code § 22107 states: 'No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement."

[17] Golden Declaration, Transcript of Judge Lewis Ruling in State v. Carman.

of reasonable suspicion for the stop collaterally estops the defendants from litigating the reasonableness of the officers; actions in determining if the officers are entitled to qualified immunity.

Under *Allen v. McCurry*, 449 U.S. 90 (1980), federal courts must apply the collateral estoppel law of the court that decided the prior proceeding on which the claim of estoppel is based. *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1121 (9th Cir. 1997). Collateral estoppel generally prevents the relitigation of an issue previously litigated and decide in a prior proceeding. Under California law, application of collateral estoppel in a subsequent proceeding requires the following:

> (1) the issue sought to be precluded is identical to the one decided in prior proceeding; (2) the issue was actually litigated and necessarily decided; (3) there was a final judgment on the merits; and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to a prior proceeding.

McCutchen v. City of Montclair, 73 Cal.App.4th 1138, 1145 (1999). Addressing the issue of finality, the Ninth Circuit in Lombardi v. City of El Cajon, 117 F.3d 1117 (9th Cir. 1997), held that, under California collateral estoppel jurisprudence, a state court suppression hearing decided in favor of the defendant in the state proceeding is not a final judgment oin the merits where the criminal prosecution is not followed by a conviction or acquittal. Lombardi v. City of El Cajon, 117 F.3d 1117, 1121 (9th Cir. 1997) (no final judgment on the merits as to the reasonableness of the officer's actions where the plaintiff in the § 1983 action was neither convicted nor acquitted in prior state prosecution and where state dropped the charges due to the state court's suppression of evidence based on material omissions from a warrant).[18] Additionally,

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the United States Supreme Court has made clear that the issue of reasonableness under the qualified immunity is analytically distinct from the Fourth Amendment's reasonableness standard applied in criminal cases to determine if evidence should be suppressed. Anderson v. Creighton, 483 U.S. 635, 643-44 (1987) (qualified immunity turns on the objective reasonableness of the officer's actions under the circumstances and not merely on whether a Fourth Amendment violation has occurred). In this case, the state court's suppression of evidence was not followed by a conviction nor did the state court have the opportunity to decide the objective reasonableness of the officer's actions. Therefore, on this record, collateral estoppel does not apply since there was no final judgment on the merits in the prior proceeding nor identity of issues between the prior proceeding and plaintiff's current § 1983 action.

B. Qualified Immunity

Because 'qualifi ed immunity is an 'entitlement not to stand trial or face the other burdens of litigation,'" Saucier v.

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[18] Plaintiff relies on McGowan v. City of San Diego, 208 Cal. App.3d 890, 895 (1989), and Teitelbaum Furs, Inc. v. Dominion Ins. Co. Ltd. 58 Cal2d 601 (1962) as illustrating that California Courts consider state court suppression rulings to be final judgments on the merits. However, these cases are distinguishable in that both cases involved convictions after the state court refused to suppress evidence. McGowan, 208 Cal.App.3d at 894; Tetelbaum, 58 Cal.2d at 603-04. Additionally, while intervening California rulings may indirectly conflict with the reasoning underlying the ruling in Lombardi v. City of El Cajon, 117 F.3d 1117 (9th Cir. 1997), see e.g. McCutchen v. City of Montclar, 73 Cal.App.4th 1138, 1145-46 (1999), the California Supreme Court has not addressed the issue thus making the Ninth Circuit's interpretation of California Law binding on this court.

Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), rather than merely a defense against liability, it is essential that insubstantial claims be resolved as quickly as possible. Saucier, 533 U.S. at 200. In order to prevail on a qualified immunity claim at summary judgment, a defendant must initially establish that there is no genuine dispute of material fact and that qualified immunity applies as a matter of law. A defendant may meet this burden by pointing to an absence of evidence to support plaintiff s claims or by establishing that an affirmative defense precludes liability. Fed.R.Civ..P. Rule 56(c); Celotex Corp. v. Catrett, 477 UI.S. 317, 325 (1986). The court views the evidence in the light most favorable to the nonmoving party and will not make credibility determinations or weigh the evidence as these functions are for the trier of fact and not appropriate at summary judgment. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 255 (1986).

As an initial matter, 'In order for a person acting under color of state law to be liable under section 1983 there must be a showing of personal participation in the alleged rights deprivation" which means, more specifically, that 'a plaintiff [can] not hold an officer liable because of his membership in a group without a showing of individual participation in the unlawful conduct. Jones v. Williams, 297 F.3d 930, 934-935 (9th Cir. 2002; see also, Cunningham v. Gates, 229 F.3d 1271, 1287 (9th Cir. 2000) (reversing district court ruling since district court failed to individually examine each defendant s claim of qualified immunity on the undisputed facts). Once there is a showing of personal participation, the court applies a two-prong test in considering if qualified immunity applies. Saucier, 533 U.S. at 201. First, the court must determine in the light most favorable to the plaintiff if the evidence has established that the alleged wrongful act violated plaintiff s constitutional rights. Saucier, 533 U.S. at 201; Butler v. Elle, 281 F.3d 1014, 1021 (9th Cir. 2002). If no constitutional violation is

apparent, then the court need not consider the second prong. Saucier, 533 U.S. at 201. If a constitutional violation could be made out from the evidence, the next question is (a) whether the right was clearly established in the specific circumstances of the case, and (b) whether a reasonable public official could have believed that the alleged misconduct was lawful. Saucier, 533 U.S. at 201; Butler, 281 F.3d at 1021.

Turning to the traffic stop of plaintiff, the parties dispute whether stopping plaintiff for the alleged traffic violation based on an asserted failure to signal a left-hand turn violated his Fourth Amendment rights. First, the law is clear that a traffic stop for a traffic violation must be predicated upon reasonable suspicion based on articulable facts that the suspect has committed such a violation. U.S. v. Lopex-Soto, 205 F.3d 1101, 1105 (9th Cir. 2000) (holding officer violated Fourth Amendment by stopping defendant based on officer s good-faith mistaken belief there had been a failure to properly affix a registration sticker to the window of defendant s car). [19] Second, sufficient evidence exists to

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[19] Moreover, even if plaintiff violated a traffic law, the "officer must initially restrict the questions he asks during the stop to those that are reasonably related to the justification for the stop." United States v. Chavez-Valenzuela, 268 F.3d 719, 724 (9th Cir. 2001) amended, 279 F.3d 1062 (9th Cir. 2002) (holding officer violated defendant s Fourth Amendment rights by detaining and questioning defendant about criminal activity unrelated to the traffic violation for which officer stopped defendant since no facts created reasonable suspicion to support further questioning and detention). The record shows that there was questioning of plaintiff by Burgess at the direction of Stoney about carrying a firearm. Sufficient evidence exists showing a genuine dispute of material fact as to whether reasonable suspicion existed to allow Burgess to question plaintiff about the

find that defendants Burgess and Stoney personally participated in the traffic stop of plaintiff since Burgess stopped plaintiff for failing to signal at the direction of Stoney, Burgess supervisor who was in radio contact with Burgess prior to the stop.[20] Third, the evidence shows a genuine dispute of material over whether a traffic violation occurred since (a) plaintiff stated in a declaration that he did signal the left-hand turn and (b) given that plaintiff was in a marked left-turn-only lane, a question exists as to whether a signal was necessary under California law.[21]

The parties also dispute whether the tip received seven months prior to the stop served as a sufficient basis for stopping and detaining plaintiff to inquire if he was carrying

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firearm since (1) Burgess initiated the questioning about the firearm; and (2) a genuine issue of fact exists as to whether plaintiff could be stopped based upon the tip that he always carried a firearm. Infra.

[20] As to the other defendant La Mesa officers, no evidence is presented from which it may be inferred that they personally participated in the initial traffic stop of plaintiff. Plaintiff does not dispute that officer Chambers arrived after the stop occurred and was present only because he received a dispatch to assist an officer. As such, there is no evidence before this court that Chambers assisted in or directed the stop of plaintiff. Similarly, the record shows that Bonds arrived on the scene only after hearing of the stop over the dispatch and did not participate in or supervise Burgess in making the traffic stop. Therefore, given Chambers and Bonds lack of personal participation in the traffic stop, they cannot be liable under § 1983 for constitutional violation due to the stop of plaintiff. See Jones v. Williams, 297 F.3d 930, 934-935 (9th Cir. 2002)

[21] See California Vehicle Code § 22107, supra at n. 7.

a firearm. Again, the law is clear that an objective legal basis must have existed to conduct the investigative stop of plaintiff. Lopez-Soto, 205 F.3d at 1106. Here, defendants have not shown as a matter of law that the seven-month-old tip that plaintiff always carried a gun based on invalid Customs credentials created a reasonable suspicion to believe that plaintiff was lawfully carrying a firearm at the time he was stopped.[22] While the staleness of the tip must be viewed in light of the nature of the crime alleged, United States v. Foster, 711 F.2d 871, 878 (9th Cir. 1983), the tip in this case, unlike those addressed in cases cited by defendants, did not involve criminal activity upon which reasonable suspiciaon might have been based. See e.g., United States v. Singer, 943 F.2d 758, 762063 (7th Cir. 1991) (six month old tip that defendant possessed firearms and involved in drug trade not stale since other evidence corroborated defendant s drug trafficking activities and use of firearms notorious where drug trafficking involved); United States v. Batchelder, 824 F.2d 563, 564-565 (7th Cir. 1987) (nine month old tip that defendant not purchased silencer not stale because officer testified that silencers were stored for long periods of time).

Therefore given the genuine disputes of material facts discussed above, summary judgment based upon qualified immunity is denied as to defendants Stoney and Burgess. However, because the plaintiff has not presented sufficient evidence to raise a genuine issue of material fact over whether defendants Chambers, Bonds, and unnamed La Mesa officer personally participated in the traffic stop and initial detention and questioning of plaintiff, Cambers, Bonds, and

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[22] Plaintiff, after his employment with Customs, allegedly told a customs employee that he always carried a firearm and justified it by carrying fraudulent customs credentials. No evidence has been presented to the court on whether this tip was corroborated at any point in time prior to the traffic stop.

unnamed La Mesa officers are entitled to summary judgment as to all claims against them.[23]

IV. CONCLUSION

For the above-stated reasons, the court grants the motion for summary judgment as to defendants Chambers, Bonds, and the unnamed La Mesa police officers on all claims, and the clerk is ordered to dismiss them with prejudice. However, the court denies the motion for summary judgment as to defendants Burgess and Stoney on the § 1983 claim but grants the motion for summary judgment as to all other claims against them.

IT IS SO ORDERED

DATED: 12/4/02

By: (s) Jeffrey T. Miller, U.S. District Court Judge

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[23] Summary judgment is also granted to all the defendant police officers on the claims brought directly under the Constitution and § 1985. No cause of action exists on the direct constitutional claims, which are duplicative of the constitutional violations alleged under § 1983 claim since 'a plaintiff may not sue a state defendant directly under the Constitution where section 1983 provides a remedy, even if that remedy is not available to plaintiff." Martinez v. City of Los Angeles, 141 F.3d 1373, 1382 (9th Cir. 1998) (summary judgment granted in favor of defendant on claims alleged directly under the federal Constitution). Similarly, no cause of action exists under § 1985 since a § 1985 claim must be based on allegations of 'racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators actions," which plaintiff has not alleged. Butler v. Elle, 282 F.3d 1014, 1028 (9th Cir. 2002) (granting summary judgment in favor of all named defendants on § 1985 claim where no racial or class-based invidious discriminatory animus alleged).